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Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

TYLER HILL CORPORATION,

Petitioner,

v.

SARA YAKIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the federal removal statute, 28 U.S.C. § 1441, a defendant who is otherwise qualified to remove a case to a federal district court has an absolute right to remove unless it has clearly and unequivocally waived that right. In this case, the petitioner, Tyler Hill Corporation, removed this action by the respondent, Sara Yakin, from the New York Supreme Court for Nassau County to the United States District Court for the Eastern District of New York, "the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a).

Affirming the district court's order of remand, the United States Court of Appeals for the Second Circuit determined that the unambiguous forum clause in the parties' contract designating that venue and the place of trial "shall be in Nassau County, New York" divested Tyler Hill of its right to a federal forum because when the Complaint was filed and the case was removed there was no federal courthouse in Nassau County, even though Nassau County had a functioning federal courthouse when the contract was executed.

The questions presented are:

1. Did Tyler Hill, by entering into the contract containing the forum clause, clearly and unequivocally waive its right to remove under 28 U.S.C. § 1441(a)?

2. Did the Second Circuit err in affirming the district court's remand order on the basis of the forum clause even though there was a federal courthouse in Nassau County when the parties entered into the contract in 1998 and Tyler Hill had not otherwise expressly waived its right to remove the case by agreeing to "venue . . . in Nassau County"?

LIST OF PARTIES

The parties in the appeal in the Second Circuit were the respondent, Sara Yakin, who was the plaintiff-appellee in the Second Circuit appeal, and the petitioner, Tyler Hill Corporation, which was the defendant-appellant.

Tyler Hill Corporation was the only defendant that appealed the district court's order to the Second Circuit. The other defendants listed in the caption of Tyler Hill Corporation's appeal to the Second Circuit (and in the caption of Yakin's Verified Complaint and in the district court action)—Tyler Hill Camp, Inc., Timber Lake Corporation, Timber Lake Camp West Corporation, Timber Lake Centers, Inc., TLC Kids Group, Inc., and Timber Lake Management Corp.—were fraudulently joined because none could be liable for any of the claims Yakin alleged in her Verified Complaint. Yakin so conceded below.

In particular, as Tyler Hill Corporation explained on pages 2 and 3 of its main brief to the Second Circuit, Tyler Hill Camp, Inc. was the owner of the Tyler Hill Camp before Tyler Hill Corporation bought the camp in 1991. As Tyler Hill Corporation also explained in its main brief to the Second Circuit and as Yakin conceded, the remaining other defendants—Timber Lake Corporation, Timber Lake Camp West Corporation, Timber Lake Centers, Inc., TLC Kids Group, Inc., and Timber Lake Management Corp.—are involved in the operation of camps other than the camp at which Yakin alleges she was injured, the Tyler Hill Camp, and had no connection with the events Yakin alleged in her Verified Complaint.

CORPORATE DISCLOSURE STATEMENT

Tyler Hill Corporation has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 566 F.3d 72 (2d Cir. 2009). A copy is attached as Appendix A to the Petition. The Second Circuit affirmed the Opinion and Order of the United States District Court for the Eastern District of New York, which is reported unofficially at 2007 U.S. Dist. LEXIS 82848 (E.D.N.Y. Nov. 6, 2007). A copy is attached as Appendix B to the Petition.

STATEMENT OF JURISDICTION

The Second Circuit's Judgment was entered on May 12, 2009, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1441(a):

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

STATEMENT OF THE CASE

Tyler Hill Corporation ("Tyler Hill") is a Pennsylvania corporation headquartered and with its principal place of business in Tyler Hill, Pennsylvania, where it operates a summer camp for children, the Tyler Hill Camp.

In her Complaint, Yakin alleges she was injured in a waterskiing activity on July 2, 1999, when she was attending the Tyler Hill Camp. She was thirteen years old at the time.

Yakin attended the Tyler Hill Camp in the summers of 1996, 1997, 1998, and 1999. In July or August of each year, Yakin's mother completed an Enrollment Application for the following year, which included "Terms of Agreement" on the reverse side. The Terms of Agreement in the Enrollment Application for the Tyler Hill Camp summer seasons in 1998, 1999, and 2000 contained this forum clause:

> It is agreed that the venue and place of trial of any dispute that may arise out of this Agreement or otherwise, to which Tyler Hill Camp, or its agents, is a party shall be in Nassau County, New York.[1]

(App. A at 2a-3a).

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1. In her motion to remand, Yakin did not produce the Enrollment Application for 1999, the year she was injured (App. B at 11a), but for purposes of her motion to remand and Tyler Hill's appeal, Tyler Hill did not dispute that the 1999 Enrollment Application contained the identical forum clause as the one in prior and subsequent contracts (App. B at 11a).

When Yakin's mother signed the agreement in 1998, there was a functioning federal courthouse in Nassau County. It was in Uniondale, New York. (App. A at 3a; App. B at 14a). When the lawsuit was filed on or about May 24, 2007, almost eight years after the accident, the Uniondale courthouse had ceased operating and there was no federal courthouse in Nassau County. (App. A at 3a; App. B at 14a).

Yakin filed her Complaint in Nassau County Supreme Court on or about May 24, 2007. On June 18, 2007, Tyler Hill filed its Notice of Removal to the United States District Court for the Eastern District of New York on the basis of diversity jurisdiction. Upon removal, the case was assigned to the division of the Eastern District of New York in Central Islip, Suffolk County, New York, the district and division embracing the place where the state court action was pending. 28 U.S.C. § 1441(a).

On July 16, 2007, Yakin filed a motion to remand the case to Nassau County Supreme Court based on the forum clause, but the district court summarily denied it, without prejudice to renew, because Yakin had failed to comply with the court's rules of practice. On July 24, 2007, Yakin reserved her motion to remand on the same grounds.

On November 6, 2007, the district court, without having had oral argument, issued an Opinion and Order (App. B) granting Yakin's motion to remand on the basis of the forum clause and ordering that the matter be remanded to Nassau County Supreme Court. Tyler Hill filed a Notice of Appeal of the order on November 26, 2007. On May 12, 2009, the Second Circuit entered its opinion affirming the district court's decision (App. A).

REASONS FOR GRANTING THE PETITION

This Court has never addressed the issue of whether a defendant waives its right to remove a case to federal court if it agreed, in a forum clause executed years before the lawsuit was filed, that venue would be in a specific county when that county had both federal and state courthouses but, years later and before the suit was filed, the only federal court in the designated county had been closed and its functions had been moved to a federal courthouse in an adjacent county in the same district.

Because forum clauses are used so widely, removals to federal courts take place every day, and federal courts must decide motions to remand all the time, this case presents an important issue of federal law and an apparent conflict between the only two Circuits that have addressed the issue.

In this case, the Second Circuit held that it was of no importance that there was a federal courthouse in the county specified in the forum clause when the parties agreed to that clause in 1998 but the courthouse had closed when Tyler Hill removed the case in 2007. (App. A at 3a, 6a-7a). In the only other case in which this issue has arisen, however, the Fifth Circuit indicated, in dicta, that it would find that the closure of the federal courthouse in the specified county after the parties agreed to the forum clause is a significant fact for remand analysis, on the theory that remand would be improper where it was brought about by a subsequent event beyond the control of the contracting parties. *See Collin County v. Siemens Bus. Services, Inc.*, 250 Fed. Appx. 45, 2007 U.S. App. LEXIS 23327 (5th Cir. Oct. 3, 2007).

This case also involves another conflict in federal law—a defendant's fundamental right under 28 U.S.C. § 1441 to remove a case that satisfies the requirements for diversity jurisdiction versus the strong federal and state policy in favor of enforcing forum clauses. Tyler Hill lost its right to remove the case to federal court, not by any affirmative intent or action on its part, but only because the federal courthouse in Nassau County happened to close several years after the parties had agreed to a forum clause specifying venue in Nassau County when there was a federal courthouse there.

1. **If the other jurisdictional requirements are met, a defendant has an absolute right to remove a case, and the Second Circuit erred in failing to begin its analysis by determining whether Tyler Hill had waived its right to remove.**

Absent an agreement to the contrary, a defendant in a state court action has an statutory right of removal if federal jurisdictional requirements are met, 28 U.S.C. § 1441(a), and that right is *absolute. See Regis Assocs. v. Rank Hotels (Mgt.) Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990) ("If the requirements of the removal statute are met, the right to removal is absolute."); *White v. Wellington*, 627 F.2d 582, 586 (2d Cir. 1980) ("the right to remove is statutory, jurisdictional and absolute").

Waiver of the statutory right to remove an action to federal court must be "clear and unequivocal." *City of New Orleans v. Municipal Administrative Services, Inc.*, 376 F.3d 501, 504 (5th Cir. 2004), *cert. denied*, 543 U.S. 1187 (2005); *Regis Assocs.*, 894 F.2d at 195; *John's Insulation, Inc. v. Siska Constr. Co.*, 671 F. Supp. 289,

294 (S.D.N.Y. 1987). "The normal construction of the jurisdiction rules includes a presumption that, where jurisdiction exists, it cannot be ousted or waived absent a clear indication of such a purpose. . . ." *City of New York v. Pullman, Inc.*, 477 F. Supp. 438, 443 (S.D.N.Y. 1979).

A party waives its right to remove by explicitly stating that it is doing so, by granting only the other party the right to choose venue, or by establishing in the contract an exclusive venue. *City of New Orleans*, 376 F.3d at 504; *Spenlinhauer v. R.R. Donnelley & Sons Co.*, 2008 U.S. Dist. Ct. Motions 13, 2008 U.S. Dist Ct. Motions LEXIS 956, *16 (D. Me. Feb. 7, 2008); *Pullman*, 477 F. Supp. at 442 & n.10.

None of these "typical indicia of a waiver of removal rights," *Spenlinhauer*, 2008 U.S. Dist. Ct. Motions LEXIS 956, *16, is present here. Tyler Hill never explicitly stated that it was waiving its right to a federal forum, the clause does not grant Yakin the right to choose venue and, as we discuss below, the plain language of the forum clause shows that the parties were not eliminating federal court jurisdiction.

But the Second Circuit began by applying the principle that a forum clause should be enforced unless it is unreasonable or fundamentally unfair, and that it must be interpreted, like any other contract term, to carry out the intentions of the parties. (App. A at 5a-6a). The Second Circuit found that the forum clause was unambiguous, that unambiguous clauses must be enforced as is, and that because the clause specified that venue must be in Nassau County, removal to the Eastern

District of New York, which no longer has a courthouse in Nassau County, was improper. (App. A at 6a). The Second Circuit's reasoning subverts the fundamental principle of the law on removal that a party has a right to remove unless it has clearly waived that right.

The proper analysis was articulated in *Pullman*, *supra*, 477 F. Supp. at 441. There the clause stated that "only the New York courts shall have jurisdiction over this contract." *Id.* The court held:

> In the absence of a specific waiver, the question is the meaning of the language employed [:] was the choice of forum provision intended to exclude a federal court sitting in the State of New York; also, was it intended as a waiver of the right of removal if a basis for removal existed?

Id. In other words, the court defined the issue as whether the parties in fact waived their right of removal, based upon their intent at the time of contracting. *Id.* at 443. It found that the clause did not explicitly preclude venue in federal court or clearly waive the right to remove to federal court. *Id.* at 442 (denying motion to remand).

2. **The forum clause is not a waiver of Tyler Hill's right to remove.**

   a. **The forum clause's geographical restriction to a political subdivision of a state does not act to exclude a federal forum.**

The forum clause states that "venue . . . shall be in Nassau County." (App. A at 2a-3a). It does not mandate that venue must be in Nassau County Supreme Court or any other state court in Nassau County, and it does not state that venue shall not be in a federal court.

If a forum clause states, as this one does, that venue shall be in a specific county or other geographical area, it does not waive federal jurisdiction or the right to remove. *See, e.g., Cronin v. Family Education Co.*, 105 F. Supp. 2d 136, 138 (E.D.N.Y. 2000) (denying motion to remand where clause stated "the parties agree to the exclusive jurisdiction of the courts located in the City and State of New York"); *Pullman*, 477 F. Supp. at 440 (denying motion to remand where clause stated "only the New York courts shall have jurisdiction over this contract"); *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Koski Constr. Co.*, 474 F. Supp. 370, 371-72 (W.D. Pa. 1979) (denying motion to remand where clause stated "the proper venue for the institution of any action . . . shall be in Erie County, Pennsylvania").[2]

2. By contrast, the right to remove is waived when the forum clause specifies that a *state* court is the exclusive venue. *Cf. Karl Koch Erecting Co.*, 838 F.2d 656, 659 (2d Cir. 1998) (Cont'd)

Because this clause identifies Nassau County only in a geographical manner, the clause, by its terms, is not a waiver of Tyler Hill's right to remove the case to federal court.

b. The forum clause's requirement that venue be in Nassau County does not act to waive venue in the Eastern District of New York, which is the district "embracing the place where [the] action is pending"—Nassau County.

The Second Circuit held that because the clause unambiguously refers to venue in Nassau County, the intention of the parties is met by remanding the case to the state Supreme Court for Nassau County because at the time of the litigation there was no federal courthouse in Nassau County (App. A at 7a-8a).

No case is precisely on point, but the Second Circuit's holding nevertheless conflicts with holdings of courts in other circuits that forum clauses similar to this clause do not waive the right to remove, even if there is no federal courthouse in the specified county.

(Cont'd)

(affirming remand where clause stated "no action or proceeding shall be commenced . . . except in the Supreme Court of the State of New York"); *Wells Fargo Century, Inc. v. Brown*, 475 F. Supp. 2d 368, 370 (S.D.N.Y. 2007) (granting motion to remand where clause read, "THE UNDERSIGNED EXPRESSLY SUBMITS AND CONSENTS TO THE JURISDICTION OF THE STATE OF NEW YORK, IN THE COUNTY OF NEW YORK, WITH RESPECT TO ANY CLAIM. . . ."); *Unity Creations, Inc. v. Trafcon Indus., Inc.*, 137 F. Supp. 2d 108, 110 (E.D.N.Y. 2001) (collecting cases).

For example, in *Links Design, Inc. v. Lahr*, 731 F. Supp. 1535 (M.D. Fla. 1990), the forum clause stated that "proper venue for said action shall be Polk County, Florida." *Id.* at 1536. The opinion does not expressly say so, but Polk County, Florida has never had a federal courthouse.[3] The court denied the plaintiff's motion to remand, holding that the clause did not mandate venue in state court and permitted removal to the federal district court *for the district that included Polk County. Id.*

Similarly, in *Truserv Corp. v. Prices Ilfeld Hardware Co.*, 2001 U.S. Dist. LEXIS 17626 (N.D. Ill. Oct. 24, 2001), the court denied the plaintiff's motion to remand where the forum clause stated that the agreement was to be enforced "only in courts located in Cook County or any Illinois county contiguous to Cook County, Illinois. . . ." *Id.* at *2. The plaintiff argued that because the federal court sat in Winnebago County, which is not contiguous to Cook County, venue in federal court was improper. *Id.* at *6. The court disagreed, finding that venue was proper because "[t]his division's limits extend to and include McHenry County, which is contiguous to Cook County. Thus this division falls within the ambit of the forum selection clause." *Id.*

As *Truserv* and *Links Design* hold, the fact that the federal courthouse in Nassau County had closed

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3. The enabling statute states, "Court for the Middle District [of Florida] shall be held at Fernandina, Fort Meyers, Jacksonville, Live Oak, Ocala, Orlando, Saint Petersburg and Tampa." 28 U.S.C. § 89(b). None of these cities is located in Polk County, Florida.

when Yakin sued Tyler Hill does not mean that Tyler Hill could not remove the case to federal court. Tyler Hill was entitled to remove the case to the Eastern District because that is the district "embracing the place where such action is pending," as 28 U.S.C. § 1441(a) requires—Nassau County.

c. The Second Circuit erred in allowing the subsequent closure of the federal courthouse in Nassau County to defeat Tyler Hill's absolute right to remove the case to federal court.

The fact that venue is proper in the Eastern District is made doubly certain by the special circumstance here: when the parties entered into the contract in 1998 for the 1999 camp program, *the Eastern District of New York had a courthouse in Nassau County.*[4] When the parties entered into the contract, "venue . . . shall be in Nassau County" meant that venue was proper in both Nassau County Supreme Court *and* the Eastern District in Uniondale.

The Fifth Circuit has addressed the issue of whether the post-contracting closure of the federal courthouse in the geographic venue that the forum clause specifies could require the parties to litigate in state court, to the exclusion of federal court, despite their intentions at the time of contracting. In *Collin County v. Siemens Bus. Services, Inc.*, 250 Fed. Appx. 45, 2007 U.S. App.

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4. Alan J. Wax, "Court Moves Make Space for Others," *Newsday*, Nov. 6, 2000 at C24. The Second Circuit and the district court took judicial notice of this fact in their opinions. (App. A at 3a (Second Circuit); App. B at 14a (district court)).

LEXIS 23327 (5th Cir. Oct. 3, 2007), the Fifth Circuit affirmed a remand to state court based on a forum clause that stated that "venue for all actions in connection with this Agreement shall lie exclusively in Collin County, Texas." It rejected the argument that although there was no federal courthouse in Collin County, Congress had authorized a federal courthouse to be built in that county, and that the district court was currently authorized to sit in Plano, a city in Collin County. 2007 U.S. App. LEXIS 23327, at *17-*22.

But the Fifth Circuit endorsed Tyler Hill's position. In dicta, it stated that its holding would likely have been different if there had been a federal courthouse in Collin County but the courthouse had closed before the case was removed:

> This would likely be a different case if, for example, there had been a federal courthouse in Collin County prior to the defendants-appellants' removal of the action but the courthouse had burned to the ground in a fire. Catastrophic events such as Hurricane Katrina demonstrate that *there may sometimes be reasons beyond a party's control that will deprive the party of its ability to try a case in federal or state court in a particular area.* Here, however, there was not, and had never been a functioning federal courthouse, and no federal district court was then sitting or had ever sat, in Collin County at the time that Siemens and SAP removed the action.

Id. at *23 (emphasis added).

When Mrs. Yakin signed the Enrollment Agreement in 1998, there was a functioning federal courthouse in Uniondale, Nassau County.[5] The forum clause, which stated that "venue . . . shall be in Nassau County," meant that either party could maintain an action in any court with appropriate jurisdiction, whether the federal court in Uniondale, the New York Supreme Court in Mineola, or any other state court in Nassau County. The subsequent closure of the federal courthouse in Uniondale was completely beyond the parties' control. As the Fifth Circuit indicated in *Collin County*, when a federal courthouse existed in the geographic area that the forum clause specifies as the proper venue but the courthouse has been closed because of forces beyond the parties' control, the closure of the courthouse does not defeat the absolute right of a defendant to remove the case to the federal court having jurisdiction over the geographic area that the parties designated as the venue.

The Second Circuit's holding treats the closure of the federal courthouse as a waiver of Tyler Hill's right to remove. But the closure of the federal courthouse in Nassau County, an event completely beyond Tyler Hill's control, is certainly not a clear or unequivocal statement or act by which Tyler Hill relinquished its right to remove the case. It was no act by Tyler Hill at all.

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5. Indeed, the enabling statute still states, "The Eastern District comprises the counties of Kings, Nassau, Queens, Richmond, and Suffolk. . . . Court of the Eastern District shall be held at Brooklyn, Hauppauge, Hempstead (including the village of Uniondale), and Central Islip." 28 U.S.C. § 112(c)).

The Fifth Circuit's reasoning in *Collin County* upholds the principle that a party has an absolute right to remove unless it unequivocally waives that right. It also upholds the goal of contract interpretation: to determine and give effect to the parties' intentions when they agreed to the contract. *See Star-Chronicle Pub. Co. v. New York Evening Post*, 256 F. 435, 441 (2d Cir. 1919). Because the forum clause shows that the parties did not intend to eliminate the federal court for Nassau County as a venue and because the closure of the federal court in Nassau County was beyond their control, the Second Circuit erred in interpreting the forum clause to bar venue in the Eastern District, the district embracing Nassau County.

CONCLUSION

The Court should grant this petition to confirm that a party's absolute right to remove cannot by abridged by a circumstance beyond its control, such as the closure of the federal courthouse in the county designated in a forum clause. The Court should also grant this petition to resolve an apparent conflict between the Second and Fifth Circuits on this issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MAY 12, 2009

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 07-5300-cv

SARA YAKIN,

Plaintiff-Appellee,

v.

TYLER HILL CORPORATION,

Defendant-Appellant,

TYLER HILL CAMP, INC., TIMBER LAKE CORPORATION, TIMBER LAKE CAMP WEST CORPORATION, TIMBER LAKE CENTERS, INC., TLC KIDS GROUP, INC. AND TIMBERLAKE MANAGEMENT CORP.,

Defendants.

February 6, 2009, Argued

May 12, 2009, Decided

Appendix A

JUDGES: Before: SACK, B.D. PARKER, Circuit Judges, and STANCEU, Judge, Court of International Trade.*

OPINION

BARRINGTON D. PARKER, *Circuit Judge*:

Defendant-Appellant Tyler Hill Corporation appeals from a decision of the United States District Court for the Eastern District of New York (Feuerstein, *J*) enforcing a forum selection clause and remanding the case to the Supreme Court of the State of New York, County of Nassau. We affirm the district court's decision, although for somewhat different reasons from those expressed by the district court.

The facts are uncontested. Plaintiff-Appellee Sara Yakin attended summer camp during the summers of 1996 through 1999 at the Tyler Hill Camp in Tyler Hill, Pennsylvania operated by Tyler Hill Corporation. In order to enroll for camp each summer, Yakin completed an application form containing various terms. Those applicable to Yakin's enrollment for the summer of 1999 included a clause that provided:

> It is agreed that the venue and place of trial of any dispute that may arise out of this Agreement or otherwise, to which Tyler Hill

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* The Honorable Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

> Camp, or its agents, is a party shall be in Nassau County, New York.

At the time Yakin submitted the application, there was a federal courthouse for the Eastern District of New York located in Uniondale, Nassau County.

On July 2, 1999, Yakin alleges she was injured while at Tyler Hill Camp after hitting a dock while waterskiing. According to her complaint, Yakin suffered "severe and permanent personal injuries" as a result of the accident. In May 2007, Yakin sued Tyler Hill in Nassau County State Supreme Court, alleging that her injuries resulted from the "carelessness and negligence" of Tyler Hill, its employees and others. By that time, the federal courthouse in Uniondale had closed and the court was re-located out of Nassau County to Central Islip in Suffolk County. The main courthouse for the Eastern District of New York remained in Brooklyn, New York. Nonetheless, Tyler Hill removed the action to the United States District Court for the Eastern District of New York on the basis of diversity jurisdiction. If successfully removed, the case would have been litigated in federal court in Suffolk County.

Yakin moved to remand the action to Nassau County State Supreme Court on the ground that the forum selection clause mandated venue and trial in Nassau County. In November 2007, after first rejecting Yakin's petition for reasons unrelated to this appeal, the district court granted Yakin's request. *Yakin v. Tyler Hill Camp, Inc.*, 2007 U.S. Dist. LEXIS 82848, at *1 (E.D.N.Y. Nov.

6, 2007). Concluding that on a motion to remand, the removing defendant bears the burden of demonstrating the propriety of removal, the district court found that Tyler Hill had not met this burden because the language of the forum selection clause was ambiguous as to whether it required an action to be brought in federal or state court, and, consequently, should be interpreted against the party that drafted it. 2007 U.S. Dist. LEXIS 82848, at *3-5. Construing the clause in favor of the non-drafter Yakin, the district court remanded the action and this appeal followed.

DISCUSSION

On appeal, Tyler Hill argues that the district court erred for two reasons. First, Tyler Hill contends that the forum selection clause is not ambiguous. According to Tyler Hill's interpretation, the clause merely designated Nassau County, New York as a geographic location for litigation and, therefore, did not exclude venue in a federal district court with jurisdiction over Nassau County. Tyler Hill argues, consequently, that the reference in the clause to venue in Nassau County does not exclude trial in the Eastern District of New York, which includes Nassau County, especially since at the time Yakin submitted the enrollment application, there was a federal courthouse in Nassau County. Second, arguing in the alternative, Tyler Hill contends that even if the forum selection clause could be held to be ambiguous, the clause would not bar Tyler Hill from a federal forum because an ambiguous clause is not a clear and unequivocal waiver of federal jurisdiction that is binding on the parties.

We review *de novo* a district court's legal conclusion regarding remand. *See Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 56 (2d Cir. 2006). Generally, a decision to remand an action to a state court from which it was removed is not reviewable. *See* 28 U.S.C. § 1447(d). However, we permit review where the remand results from an interpretation of a forum selection clause because the rationale behind Section 1447(d)'s nonreviewability rule—the prevention of delay—"is not applicable when a district court with subject-matter jurisdiction remands a case on the basis of its interpretation of a forum-selection clause." *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658 (2d Cir. 1988). Here, we are reviewing a legal conclusion since the meaning of a forum selection clause is a matter of contract interpretation, *see id.*, and "[t]he initial interpretation of a contract is a matter of law for the court to decide," *Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 42 (2d Cir. 2006) (internal quotation marks omitted).

We first consider whether the forum selection clause is ambiguous, a threshold question of law. An ambiguity exists where a contract term "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Morgan Stanley Group Inc. v. New England Ins. Co.*, 225 F.3d 270, 275 (2d Cir. 2000) (internal quotation marks omitted). A forum selection clause is to be interpreted

in accordance with accepted principles of contract construction. *See Karl Koch Erecting Co.*, 838 F.2d at 658 (explaining that a district court's decision to remand a case on the basis of its interpretation of a forum-selection clause is a "determination of the validity and meaning of a contract"). Parties are free to bind themselves to forum selection clauses that trump what would otherwise be a right to remove cases to federal courts. *See id.* at 659-60; *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 386 (2d Cir. 2007) ("[C]ontracting parties may . . . agree in advance on a forum where any and all of their disputes must be brought . . . .").

We perceive no ambiguity in the forum selection clause. A reasonable person reviewing the statement "It is agreed that the venue and place of trial of any dispute that may arise out of this Agreement . . . shall be in Nassau County, New York," would necessarily conclude that the parties intended that litigation take place in an appropriate venue in Nassau County and that this commitment was not conditioned on the existence of a federal courthouse in that county.

Tyler Hill contends that nothing in the wording of the clause requires that a dispute be litigated in Nassau County State Supreme Court and, as a result, the clause does not on its face exclude federal jurisdiction. This may be true,[1] but it misses the point. According to the

1. We express no view as to whether a forum selection clause must stipulate a specific non-federal jurisdiction in order to require remand for jurisdictional purposes, as opposed to venue purposes.

Supreme Court, forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). A forum selection clause may bind parties to either a specific jurisdiction or, as here, a specific venue. *See Phillips*, 494 F.3d at 386 ("A forum selection clause is viewed as mandatory when it confers exclusive jurisdiction on the designated forum or incorporates obligatory venue language."). To the extent that a forum selection clause binds diverse parties by its express terms to a specific jurisdiction that is not federal, it waives a statutory right to remove. *See* 28 U.S.C. § 1441(b). However, where, as here, the clause merely contains obligatory venue language, it conveys nothing about the parties' intent as to jurisdiction. As the Supreme Court has stated, we are obliged to give effect to the parties' intentions regarding venue "by specifically enforcing the forum clause" absent a strong showing that it should be set aside. *M/S Bremen*, 407 U.S. at 12.

Given that the forum selection clause contains only obligatory venue language, we will effectuate the parties' commitment to trial in Nassau County. Had there been a federal court located in Nassau County at the time of this litigation, remand would have been improper. But there was none. In addition, contrary to Tyler Hill's contention, no reasonable reading of the clause permits the interpretation that the parties had agreed to trial in Suffolk County or Brooklyn because those

courthouses were within the Eastern District of New York, which spans an area including Nassau County. Had the parties intended to provide for that result, they could, of course, have drafted a different forum selection clause that communicated that intent. We are free only to interpret and enforce the clause as written.

CONCLUSION

The decision of the district court is AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FILED NOVEMBER 6, 2007

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

07-CV-2444 (SJF)(WDW)

SARA YAKIN,

Plaintiff,

-against-

TYLER HILL CAMP, INC., TYLER HILL CORPORATION, TIMBER LAKE CORP., TIMBER LAKE CAMP WEST CORP., TIMBER LAKE CENTERS, INC., TLC KIDS GROUP, INC., and TMBERLAKE MANAGEMENT CORP.,

Defendants.

November 6, 2007, Decided

November 6, 2007, Filed

JUDGES: Sandra J. Feuerstein, United States District Judge.

Appendix B

OPINION & ORDER

FEUERSTEIN, J.

I. Introduction

Plaintiff Sara Yakin commenced this action against Defendants Tyler Hill Camp, Inc, Tyler Hill Corp., Timber Lake Corp, Timber Lake Camp West Corp., Timber Lake Centers, Inc., TLC Kids Group, Inc. and Timberlake Management Corp. (collectively, Defendants) in the Supreme Court of the State of New York, County of Nassau, seeking damages for personal injuries sustained by Plaintiff in 1999 at a summer camp maintained by Defendant Tyler Hill Corporation. On or about June 18, 2007, Defendant Tyler Hill Corporation filed a Notice of Removal to remove the state court action to this Court, pursuant to 28 U.S.C. § 1441 (a) and 28 U.S.C. § 1332 (a)(1) and (c)(1). Plaintiff, in turn, seeks to have the matter remanded to state court pursuant to 28 U.S.C. § 1447 (c). For the reasons set forth below, Plaintiffs motion is granted.

II. Background

A. Factual Background[1]

The Plaintiff's complaint stems from injuries Plaintiff allegedly received on or about July 2,1999 at

1. The following facts are taken from the pleadings and do not constitute findings of fact by the Court.

the Tyler Hill Camp in Tyler Hill, Pennsylvania. (Complaint (Compl.), p. 1). According to the affidavit of the Executive Director of Defendant Tyler Hill Corporation, "documents in the possession of Tyler Hill Camp indicate that as a result of the incident on July 2, 1999, the plaintiff . . . fractured her right clavicle and she was initially treated for her injury at the Wayne Memorial Hospital in Honesdale, Pennsylvania." (Motion to Remand, Exhibit (Ex.) D, p. 5).

Plaintiff's mother, Jenny Yakin, submitted an affidavit in support of Plaintiff's motion to remand stating that Plaintiff attended the Tyler Hill Camp in Tyler Hill, Pennsylvania for the years 1996, 1997, 1998 and 1999. While Plaintiff cannot produce the enrollment application for the 1999 season, she claims that the terms of agreement for that year were identical to those of the previous years, and that the terms of agreement for 1999 contained a forum selection clause which requires that the venue for any legal dispute arising out of the agreement "shall be in Nassau County, New York."(Yakin Affidavit, pp. 1-2). Defendants do not contest the presence or phrasing of the forum selection clause in the form contract used by Tyler Hill Camp in 1999.

B. Procedural Background

Plaintiff filed the instant complaint against Defendant on or about May 24, 2007 in the Supreme Court of the State of New York, Nassau County, index number 07-9203, seeking damages, costs and

disbursements. (Compl., p. 6) On or about June 18, 2007, Defendant removed the action to this Court, pursuant to 28 U.S.C. § 1441 *et seq.* and 28 U.S.C. § 1332 (a)(1) and (c)(1). Plaintiffs now move pursuant to 28 U.S.C. § 1447 (c) to remand this action to the state court, claiming that the forum selection clause requires that the action be heard in New York State Court in Nassau County.

III. Discussion

A. Removal Jurisdiction

A civil action initially filed in state court may be removed by the defendant to federal district court, provided that the district court has original subject matter jurisdiction over the plaintiff's claim, pursuant to 28 U.S.C. § 1441. See Lupo v. Human Affairs International, Inc., 28 F.3d 269, 271 (2d Cir. 1994). Removal jurisdiction is strictly construed, and "out of respect for the limited jurisdiction of the federal courts and the rights of states, [courts must resolve] any doubts against removability." California v. Atlantic Richfield Co. (In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.), 488 F.3d 112, 124 (2d Cir. 2007) (citations omitted). On a motion to remand, the removing defendant "bears the burden of demonstrating the propriety of removal." California Public Employees' Retirement System v. Worldcom. Inc., 368 F.3d 86, 100 (2d Cir. 2004) (citations omitted).

Appendix B

B. The Forum Selection Clause

At issue is whether the forum selection clause in the enrollment agreement between the parties requires this Court to remand the instant case to state court. The clause in question states as follows:

> It is agreed that the venue and place of trial of any dispute that may arise out of this Agreement or otherwise, to which Tyler Hill Camp, or its agents, is a party shall be in Nassau County, New York. (Yakin Affidavit, p. 2).

"It is well established that a forum selection clause may act as a waiver of defendant's right to remove an action to federal court." John's Insulation. Inc. v. Siska Constr, Co., 671 F. Supp. 289, 294 (S.D.N.Y. 1987) (citations omitted). However, "[s]uch a waiver must be clear and unequivocal. If the forum selection clause is ambiguous in that it is susceptible of two reasonable meanings, it will be construed against the party who drafted it." Id. (citing Stern v. Satra, 539 F.2d 1305, 1310 (2d Cir. 1976)). An ambiguous term or phrase is one which is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." Sirico v. RIH Acquisitions NJ, LLC, 2006 U.S. Dist. LEXIS 84162 (E.D.N.Y. 2006) (quoting Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp., 818 F.2d 260, 263 (2d Cir. 1987).

Defendants argue that because the clause does not specify whether it is referring to state or federal court, and because Nassau County is within the jurisdiction of the Eastern District of New York, the forum selection clause does not bar maintaining the matter in this Court. (Defendant's Memorandum in Opposition to Plaintiff's Motion to Remand (Opp.), pp. 4-5). Plaintiff argues that "Nassau County, New York" can only refer to New York State Court, noting that "there is no federal courthouse in Nassau County." (Plaintiff's Memorandum in Reply (Reply), p. 1). However, in 1999, at the time the contract was executed, the Eastern District had a courthouse located in Uniondale[2] in Nassau County.[3] Thus, as of the date of the contract's execution, the "venue and place of trial . . . in Nassau County" indicated by the forum selection clause might have referred to either federal or state court.

Nevertheless, "(t)he fact that the provision does not specify federal or state court does not make it invalid, but rather allows suit to be brought in either court." Mooney-Kelly v. Islands Publ'g Co., 2002 U.S. Dist. LEXIS 1256 (S.D.N.Y. 2002), citing City of New York v. Pullman Incorporated, 477 F. Supp. 438 (S.D.N.Y. 1979). Ambiguities in forum selection clauses are construed against the drafter. John's Insulation. Inc., 671 F. Supp.

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2. Alan J. Wax, *Court Moves Make Space for Others*, NEWSDAY, November 6, 2000 at C24.

3. This Court may take judicial notice of geography. Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd., 230 F.3d 549, 556 (2d Cir. 2000).

at 294, See also Unity Creations. Inc. v. Trafcon Indus., 137 F. Supp. 2d 108, 111 (E.D.N.Y. 2001) (citing Albany Savings Bank v. Halpin, 117 F.3d 669, 674 (2d Cir. 1997); Pullman, 477 F. Supp. at 443. Since the forum selection clause is ambiguous, and Defendants drafted the clause, Plaintiff's motion is granted.

IV. Conclusion.

Plaintiff's motion to remand is GRANTED and this action is remanded to the Supreme Court of the State of New York, County of Nassau. The Clerk of the Court is directed to close this case and, pursuant to 28 U.S.C. § 1447(c), to mail a certified copy of this order to the Clerk of the Supreme Court of the State of New York, County of Nassau.

IT IS SO ORDERED.

/s/ Sandra J. Feuerstein
Sandra J. Feuerstein
United States District Judge

Dated: November 6,2007

Central Islip, New York